PREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 21 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 219

UNITED STATES OF AMERICA, EX REL.
COSME ROSADO,

Petitioner,

—v—

WALTER J. FLOOD, WARDEN OF NASSAU COUNTY JAIL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Court below agreed with Petitioner that the use against him of wiretapping without anyone's consent constituted a violation of Federal Law (47 U.S.C. §§ 605, 501) as well as an invasion of Rosado's privacy. The Circuit Court, however, held that it was powerless to interfere with the use by the State of New York of such illegal wiretap evidence and was also powerless to release Rosado from custody by virtue of such wiretaps because this Court in *Schwartz* v. *Texas,* and *Pugach* v. *Dollinger* had ruled that the Federal Court could not interfere with a state prosecutor who was bent upon the use of illegal wiretap evidence 16

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WALTER J. FLOOD, WARDEN OF NASSAU COUNTY JAIL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Cosme Rosado, prays that a Writ of Certiorari issue to review the original order and the order of the United States Court of Appeals for the Second Circuit, rendered the 17th day of May, 1968, denying petitioner a re-hearing of its order affirming the decision and order of the United States District Court for the Eastern District of New York which had denied petitioner a writ of habeas corpus. The United States Court of Appeals however did grant a stay of the mandate and also continued petitioner Rosado on bail pending the determination of the application for certiorari.

Opinion Below

The United States Court of Appeals delivered two separate opinions in deciding this case. One opinion by Judge Feinberg, concurred in by Judge Waterman, indicated that

the writ of habeas corpus possibly would have been issued were it not for this Court's opinions in *Schwartz* v. *Texas*, 344 U.S. 199 and *Pugach* v. *Dollinger*, 365 U.S. 458. The concurring opinion of Chief Judge Lumbard indicated that the Federal Court had no right to interfere with State Law enforcement procedures in a case such as this.

All three judges, however, seemed to agree that the State Police authorities and the District Attorney had violated Federal Law and that petitioner had no redress whatsoever because of the decisions of this Court in *Schwartz* v. *Texas* and *Pugach* v. *Dollinger supra*.

Jurisdiction

Both the United States District Court and the United States Court of Appeals rendered decisions on the merits and assumed full jurisdiction of this question. The jurisdiction of this Court is invoked under Title 28, Section 1254 (1) United States Code.

The Court below denied a petition for re-hearing but granted a stay of mandate and bail on the 17th day of May, 1968.

The Questions Presented for Review

1. Whether the underpinnings of *Schwartz* v. *Texas*, 344 U.S. 199 and *Pugach* v. *Dollinger*, 365 U.S. 458, have been so eroded by subsequent decisions of this Court in cases such as *Mapp* v. *Ohio*, 367 U.S. 643; *Wayne Dyke* v. *Taylor Implement Mfg. Co. Inc.*, —— U.S. ——, 3 Cr. L. 3083, 3084 (decided May 20th, 1968); *Berger* v. *New York*, 388 U.S. 41; and *Katz* v. *United States*, 389 U.S. 347, that *Schwartz* and

Pugach can no longer be regarded as controlling or as valid law?

2. Whether the petitioner could lawfully and constitutionally be incarcerated for criminal contempt for refusing to aid and abet the District Attorney of Nassau County in violating Title 47 United States Code, Sections 605 and 501, that is, by refusing to divulge the contents and substance of wiretapped conversations in which Rosado was a party and which had been obtained, concededly, without the consent of either participant to the conversation? The District Attorney has admitted that Rosado was subpoenaed before a Nassau County Grand Jury exclusively and solely because he had been overheard by a wiretap without his or anyone else's consent.

3. Whether it is lawful or constitutional to compel any unwilling person to divulge the contents of any wiretap in view of the fact that such wiretaps violate not only the Fourth Amendment of the United States Constitution but constitutes the commission of a Federal Crime under the Federal Communications Law. (Sections 605 and 501).

4. Whether *Schwartz* v. *Texas* and *Pugach* v. *Dollinger*, *supra*, preclude and prevent the Federal Government from interfering with or restraining State Law enforcement authorities from violating Federal Law or from imprisoning citizens who refuse to join them in such violations? The United States Court of Appeals held that the Nassau County District Attorney unquestionably violated Federal Law and that the use of wiretap evidence was apparently illegal but that because of *Schwartz* v. *Texas* and *Pugach* v. *Dollinger*, they were powerless, not only to restrain the commission of these crimes, but were likewise powerless to pre-

vent the imprisonment of Rosado who refused to aid and abet these violations of Federal Law. The United States Attorney's office for the Eastern District of New York had been advised of these violations but had done nothing whatsoever to prosecute such transgressions of Federal Law.

5. Whether the United States Attorneys may enter into a sub silento agreement that State Law enforcement officers may violate Federal Law without fear of Federal prosecution and whether under such circumstances the Federal Courts are powerless to at least liberate the hapless victim of such illegality from prison by granting a writ of habeas corpus.

6. Whether the New York Statute authorizing wiretaps, under which the District Attorney of Nassau County supposedly acted, is legal and constitutional in view of *Berger* v. *New York* and *Katz* v. *United States?* (See *Kaiser* v. *New York*, U.S. 3 CrL 4041, certiorari granted April 22nd, 1968).

7. Whether the New York Law permitting wiretapping violates the supremacy clause of the United States Constitution, Article VI, Clause 2 since Congress has prohibited the use of wiretapping in the Federal Communications Act?

Constitutional and Statutory Provisions Involved

Pertinent portions of the United States Constitution, Article I, Section 9; Article VI, Clause 2, Amendment IV and XIV of the United States Constitution, Article I, Section 12, New York Constitution, Sections 605 and 501 of Title 47 United States Code, and Section 813(a) of the New York Code of Criminal Procedure are set forth in the appendix (app. 9).

Statement of the Case

The petitioner, Cosme Rosado, is 38 years of age, married and the father of 3 children. He has never been convicted of any crime other than criminal contempt involved in the investigation which the Grand Jury of Nassau County, through the District Attorney of Nassau County is presently conducting and which gave rise to the present case.

Rosado is a citizen of the United States and has been the target of an investigation by the District Attorney of Nassau County into Interstate gambling through various Grand Juries. Rosado, the District Attorney alleges, is not involved in any of the criminal activities concerning the investigation.

The District Attorney has conceded on several occasions that Rosado became known to the investigation solely and exclusively through wiretapping without the consent of any party to the conversations. It is further alleged that Court orders had been obtained under Section 813-a of the New York Code of Criminal Procedure in order to obtain the wiretaps. (These orders, if they exist, have never been displayed to the petitioner or his counsel).

In or about June, 1966, the petitioner was "arrested" as a material witness in Nassau County and held in $25,000.00 bail. At the time of his arrest, Rosado was compelled to listen to certain wiretaps which the District Attorney had previously recorded. These involved conversations to which Rosado was a party.

It is not disputed that no "consent" has ever been obtained to make these wiretaps or to divulge their contents. The petitioner has consistently answered all questions be-

fore the Grand Jury and has obeyed all subpoenas as well as subpoenas duces tecum for his records and for those of a union of which he is president. He has however, declined to reveal the contents or substance of wiretaps, citing the fact that Federal Law would thereby be violated (47 U.S. C. Sections 605 and 501). The District Attorney had revealed portions of these wiretaps in newspaper statements about the investigation; at a trial for criminal contempt; and at the time that Rosado was arrested as a material witness. The prosecutor has played, without consent, substantial portions of wiretaps of Interstate conversations between Rosado's wife and her mother.

Although Rosado is apparently charged with no crime, he has suffered incarceration for over 90 days as well as suffering severe economic losses to say nothing of pervasive and widespread publicity and notoriety which has damaged his reputation in standing in his community. It has caused untold anguish to his wife, children and relatives as well as his friends.

Rosado has exhausted State remedies by having applied to the Appellate Division of the New York Supreme Court as well as a Judge of the Court of Appeals of New York both of whom refused to grant stays and refused to prohibit the District Attorney from committing Federal crimes or from violating the Federal Constitution, Amendment IV and XIV.

In view of *People* v. *Kaiser,* 21 N.Y. 2d 86 certiorari granted U.S. (April 22nd, 1968) the petitioner is without any remedy at all in the State of New York.

The United States District Court noted jurisdiction as did the United States Court of Appeals for the Second

Circuit. A writ of habeas corpus had been sought in the Federal Courts but this was declined in view of this Court's opinions in *Schwartz* v. *Texas* and *Pugach* v. *Dollinger*.*

POINT I

The Court below clearly ruled that wiretapping evidence may not be disclosed sans consent of the sender and that violations of this rule constituted a federal crime. Yet, despite this opinion, the Circuit Court felt that it could not grant relief of any sort because of this Court's rulings in *Schwartz v. Texas* and *Pugach v.* Dollinger. This Court should declare these cases as obsolete and impliedly overruled.

A

Petitioner thus faces both the incarceration and economic and social penalties despite the clear recognition that the District Attorney is using illegal evidence and committing a federal crime (47 U.S.C. §§ 605, 501).

The incredible dilemma recognized by the Court below is that Rosado, the Petitioner herein, may be victimized by the District Attorney of Nassau County and indefinitely incarcerated and destroyed economically and socially despite the fact that the district attorney is committing a Federal crime (disclosing wiretaps) and using illegal evidence.

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* It should be noted that the counsel for Rosado and the author of this brief argued the case of *Pugach* v. *Dollinger* in this Court when he was a prosecutor and by coincidence now represents Rosado. A complaint made to the United States attorney for the Eastern District proved fruitless as no action was taken against the District Attorney. No hearing was held in the United States District Court.

It is not disputed that Rosado was subpoenaed and became known to the prosecutor solely through the use of wiretapping without consent.

In its slip opinion the Circuit Court, throwing up its hands, figuratively, in frustration, observed: (slip op. 1962, A4-5)

> "Rosado's brief eloquently argues that the state practice of allowing judicially authorized *wiretaps is in conflict with section 605. The point hardly needs elaboration;* most recently, it was the subject of opinions of the Supreme Court in Benanti v. United States, 355 U.S. 96 (1957), and of this Court in Pugach v. Dollinger, 275 F.2d 503 (2d) Cir. 1960) (granting stay); Pugach v. Dollinger, 277 F.2d 739 (2d Cir. 1960) (*en banc*), aff'd 365 U.S. 458 (1961)."

The Court below, then raised the question of the viability of *Schwartz* v. *Texas* and *Pugach* v. *Dollinger,* indicating that *unless* this Court clarifies those cases, the Circuit Courts felt powerless to give redress to anyone victimized by wiretapping. (slip opinion 1962)

> "However, even if we agree with appellant that the *District Attorney has violated section 605,* there is a *substantial question* whether because of that we could properly grant the writ *under presently controlling law.* Under Schwartz v. Texas, 344 U.S. 199 (1952), *evidence obtained in violation of section 605 may nonetheless be introduced* in a criminal trial in a state court." (Italics ours)

The Circuit Court continued to explain that despite its feeling that the district attorney was violating the law and that it might be best to prohibit such evidence, it was constrained to do nothing at all because of *Schwartz* and *Pugach.*

> "Moreover, federal prosecutors have shown no apparent interest in violations of section 605 by state officers, despite some strong suggestions by the courts. E.g., Pugach v. Dollinger, 277 F.2d at 746 (Waterman, J. concurring). Cf. People v. Kaiser, 286 N.Y.S. 2d 801, 814, cert. granted . . ."

Finally, the Court below noted that while it might strongly disagree with the state of the law, it could do naught unless this Court clarifies the state of the law.

> "*So long as that state of the law remains unchanged, however much some of us might disagree with it,* a strong case can be made that we must affirm here; the argument would be that if we would not interfere with the use of wiretap evidence at a state trial, *a fortiori* we should not interfere with collection of the evidence here by the Nassau County Grand Jury.
>
> "It is true that the law on electronic eavesdropping is in flux. . . ." (Slip op. P. 1962) (A-5)

Another puzzling aspect of the opinion before the Circuit Court is that it assumes that a person who is not actually made a defendant can be the victim of virtually any sort of unconstitutionality without the right of redress in any forum unless and until he is made a "defendant".*

Thus, if a witness is bull-whipped in a grand jury or subject to threats and pressures of any description, presumably,

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* Although the Circuit Court assumed, slip opinion P. 1963-4, that Rosado had not been indicted, the truth is that he was indicted twice and convicted once of criminal contempt under an indictment. Indeed, despite the granting of a stay of mandate and continuance of bail by the Circuit Court, the District attorney of Nassau County with consistent demonstrations of disdain for federal law, subpoenaed Rosado again seeking to obtain the very evidence which is the subject of this Petition and included within the Stay of Mandate.

he would have to await indictment before redress is granted. Presumably the district attorney and U. S. Attorney would refuse to prosecute themselves.

The mere articulation of this proposition exposes its absurdity. A citizen of the United States ought not be victimized by the oppressive might of the State without remedy when it is clear that the State is violating federal law (Art. VI, Sec. 2, U.S. Const).* The Court below recognized that the district attorney has violated the law and that the United States Attorneys have refused to intervene. Perhaps it may not be possible to compel the United States Attorney General to prosecute a lawless State prosecutor, but that should not present the Courts from *at least* ordering the *release* of such victim on Habeas Corpus if he is incarcerated under such circumstances.

In *Weems* v. *United States,* 217 U.S. 349, 368-9, 371, 373 (1910), this Court recognized that due process is a dynamic and changing process. It cannot remain static. What clearer evidence of this recognition in this field can be noted than *Katz* v. *United States,* 389 U.S. 347, and *Berger* v. *United States,* 388 U.S. 41?

In *Cummings* v. *Missouri,* 4 Wall. 277, 320 (1866) this Court recognized:

> "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact."

Thus the Court below, in essence, says that wiretapping and its divulgence cannot be the concern of the courts of the

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* Supremacy Clause.

United States unless an indictment is returned. In the meantime an Orwellian "Big Brother is Watching" society (Orwell, *1984*) may be imposed so that the State may intrude into any sort of privacy imaginable and incarcerate its citizens for contempt if they decline to tell all they know about these invasions of privacy. Nothing can be done the Circuit Court says however, unless an indictment is returned.

In *Olmstead* v. *United States,* 277 U.S. 438, the dissenting opinion of Brandeis, J. which has in large measure been vindicated by *Katz* v. *United States, supra,* said, inter alia:

> "The makers of our constitution undertook to secure conditions favorable to the *pursuit of happiness.* They recognized the significance of mans' spiritual nature, of his feeling and his intellect . . . they sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the government the *right to be let alone*—the most comprehensive of rights and the *right most valued* by civilized man." (emphasis ours)

See: Warren and Brandeis, *"The Right to Privacy"*, 4 Harv. L. Rev. 193 (1890).

Katz v. *United States* clearly held that a telephone conversation is by its very nature a private affair from its inception. One does not use a telephone with the belief or expectation that the government is listening in. Thus 47 U.S.C. § 605 and § 501 make it a crime to even divulge the existence of a wiretap, no less its contents.

Generally, the government may not interfere with a citizen's freedom or privacy of associations (*NAACP* v. *Alabama,* 357 U.S. 449, 462.) To some extent the Fifth Amend-

ment "reflects the Constitution's concern for . . . '. . . the right of each individual to a *private enclave* where he may lead a *private life*' " (*Tehan* v. *Shott*, 382 U.S. 406, 416). (Emphasis ours).

B

The Circuit Court encourages, rather than discourages official illegality contrary to *Mapp v. Ohio*.

The rulings of this Court in *Schwartz* v. *Texas* and *Pugach* v. *Dollinger* represent the view of this Court as it existed prior to *Mapp* v. *Ohio*, 367 U.S. 643, 655-56. (See, *Wolf* v. *Colorado*, 338 U.S. 25, 28 (1949)). Thus the view of both *Schwartz* and *Pugach* espouse the rejected holding of *People* v. *Defore*, 242 N.Y. 13.

Mapp v. *Ohio, supra* clearly indicated that it is the *"deterrence" of official illegality* which is at the root of the Fourth Amendment and to now rule, as has the Circuit Court, that the rationale of this Court in *Schwartz* v. *Texas* and *Pugach* v. *Dollinger* must still be followed is clearly anachronistic and fallacious.

It is again emphasized that the constitutional violation against Rosado has been and is being raised. It is maintained, however, that section 605 of the F.C.C. act itself should be sufficient under the *supremacy clause* of the Constitution to warrant the relief requested. (Art. VI cl. 2)

What the Court below has done in essence, is to hold that the *Defore* case and *Wolf* v. *Colorado* are still good law and that despite *Berger* v. *New York* and *Katz* v. *United States*, the states are free to use wiretapping with impunity and to even incarcerate victims thereof.

The Circuit Court did indicate its displeasure with the activities of the District Attorney of Nassau County (which is the same county *Kaiser* v. *New York* arose in) but in effect is imploring this Court to once and for all clarify *Schwartz* v. *Texas* and *Pugach* v. *Dollinger.* In view of *Mapp* v. *Ohio* and *Berger* and *Katz* there does not appear to be any doubt but that the holdings in the former two cases are not valid any longer.

This Court ought to make this unequivocally clear.

C

The Statute (§ 813-a, N.Y. Code Crim. Pro.) under which the District Attorney allegedly obtained the wiretaps has been declared unconstitutional by this Court and even the New York Court of Appeals has never doubted that despite New York law, wiretapping is still a federal crime.

In its argument in the Circuit Court, the district attorney brashly disputed the right of the federal courts to even inquire into the use of wiretaps by state officials.

In *People* v. *Kaiser,* 21 N.Y. 2d 86, 286 N.Y.S. 2d 801, 814, cert. granted 36 U.S.L.W. 3404 (U.S. April 22, 1968), Chief Judge Fuld clearly proclaimed wiretapping a violation of the laws of the United States, Section 605 of Title 47 USC.

Even the majority opinion, however, noted that wiretapping is violative of federal law; but observed that since the federal courts and prosecutors have refused to intervene in such violations, why should they pay any attention to it either!*

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* The N.Y. Court of Appeals decided to ignore the law (47 U.S.C. §605) (*Kaiser,* 21 N.Y. 2d at 102):

> "The defendant argues, however, that the very interception of the telephonic communication violates Federal law and that 'At this time when the people of this state and

In *Benanti* v. *United States*, this Court unequivocally ruled wiretapping a federal violation. Why then is there any doubt that the evidence thus obtained should not be used at all? How can this Court countenance the incarceration of a citizen by virtue of the commission of a crime against him (*Benanti* v. *United States*, 355 U.S. 96, 101).

The district attorney maintains that wiretapping is a useful weapon against crime. The stationing of a soldier in everyone's house might also be such a weapon, but this may not be done. This Court should require a probe of the use of wiretapping by Nassau County as it is believed that it is more prevelant there than anywhere else perhaps in the nation. Nassau County has consistently refused to permit a hearing on the legality of the tap or to let the Petitioner even see the alleged order.

The area of wiretapping remains the one anomaly in the scope of *Mapp* v. *Ohio*. Here alone it seems that the rule of *People* v. *Defore* still reigns supreme. This Court as will

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country are being called upon to reaffirm their allegiance to the rule of law, it is a complete farce for the courts, procecutors and police of this state to sanction such criminal behavior.' . ...

"Moreover, *we are dealing here with the violation of a statute which those charged with the primary and exclusive responsibility for its enforcement have continuously refused to enforce against State officials* who, acting pursuant to State law, violate the statute. (Statement of Attorney General Robert F. Kennedy to Senate Judiciary Committee, March 29, 1962; Statement of Attorney General William P. Rogers, New York Times, Dec. 24, 1957, p. 10, col. 1.) *If the statute is viable, let it be enforced. If the statute is flouted, let the offender be prosecuted.* Because the constitutional provisions carried no penal sanctions to discourage violation, exclusionary rules were necessary. No such problem is presented by a statute carrying penal sanctions.

In light of what can only be deemed a *policy of nullification by Federal officials, a State court, we believe, is justified in questioning whether it should indirectly enforce a Federal statute which the Executive has consistently refused to enforce* —a refusal the Congress has impliedly sanctioned."

be demonstrated has already impliedly overruled *Schwartz* and *Pugach* and once and for all should so declare.

In the case at bar, the district attorney played wiretaps for petitioner when he was arrested. It was never contested that the sole basis for petitioner's involvement in the investigation is the unlawful wiretaps. He has already been indicted twice under the criminal contempt statute and has been incarcerated for over 90 days. The district attorney has been shifting from one grand jury to another and has not and is not even making a pretense of a good faith investigation. (*Shillitani* v. *United States*, 384 U.S. 464 (1966)).

Rosado has thus been victimized by being the subject of a wiretap without his or any other party's consent pursuant to an alleged order which this Court has already branded as unconstitutional on its face (*Berger* v. *New York*, 388 U.S. 41).

This Court ought to once and for all resolve the question of *Schwartz* v. *Texas* and *Pugach* v. *Dollinger* so that there can no longer be any doubt but that those cases have been superceded by a doctrine that forbids illegality on the part of law enforcement agencies under any pretense. No benefit should flow from such illegality lest it encourage rather than discourage official lawlessness.

That suspects may go unwhipped of justice has not the slightest relevance since lawlessness cannot be condoned in the name of enforcing law and order. (See: *Bubis* v. *United States*, (9th Cir. 1967) 2 Cr. L. 2123; *United States* v. *Tane*, 329 F. 2d 848 (2 Cir. 1964); In re *Telephone Communications*, 9 Misc. 2d 121. See, also, *Lee* v. *Florida*, cert. granted 2 Cr. L. 2274).

A *zone of privacy* must be maintained to sustain human dignity. (*Griswold* v. *Connecticut*, 381 U.S. 479).

POINT II

Petitioner maintains that subsequent decisions of this Court have so eroded the underpinnings of *Schwartz v. Texas*, 344 U.S. 191 and *Pugach v. Dollinger*, 365 U.S. 458 that those cases no longer represent the position or rulings of this Court on the question of wiretapping and eavesdropping.

The Court below agreed with Petitioner that the use against him of wiretapping without anyone's consent constituted a violation of Federal Law (47 U.S.C. §§ 605, 501) as well as an invasion of Rosado's privacy. The Circuit Court, however, held that it was powerless to interfere with the use by the State of New York of such illegal wiretap evidence and was also powerless to release Rosado from custody by virtue of such wiretaps because this Court in *Schwartz v. Texas*, and *Pugach v. Dollinger* had ruled that the Federal Court could not interfere with a state prosecutor who was bent upon the use of illegal wiretap evidence.

A. Both *Schwartz* v. *Texas* and *Pugach* v. *Dollinger supra* antedated this Court's opinion in *Mapp* v. *Ohio*, 367 U.S. 643, and it is inconceivable that the rulings of this Court preclude a Federal Court from releasing a state prisoner from custody where his incarceration is due solely to the use of illegal wiretap evidence against him and the State Courts have failed and refused to assist him.

Cosme Rosado, the Petitioner herein, was incarcerated on three separate occasions for criminal contempt for refusing to divulge the contents and substance of wiretaps in which he was one of the speakers. In addition to the foregoing, Rosado was indicted for criminal contempt under §600 of the New York Penal Law and was sentenced to four months

imprisonment but he had been released on a Certificate of Reasonable Doubt in connection with that conviction. The decision in the present case will unquestionably resolve all the issues concerning Rosado's position that he is not required to aid and abet the District Attorney in the divulgence of wiretaps by revealing their contents. The mere divulgence of the existence of a wiretap by the District Attorney constituted a violation of §605 of the Federal Communications Act.

In *Berger* v. *New York*, 388 U.S. 41 at 56 and 65, this Court declared:

> "*. . . Few threats to liberty exist . . . which are greater than that posed by the use of eavesdropping devices.*" (emphasis ours)

This Court considered the question of wiretap by state law enforcement officials in the cases of *Schwartz* v. *Texas* and *Pugach* v. *Dollinger*. Both of those cases were decided prior to this Court's opinion in *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

The rulings of *Schwartz* v. *Texas* and *Pugach* v. *Dollinger* have been interpreted as meaning that the Federal Courts could do nothing if a State decided to permit the use of illegal wiretap evidence notwithstanding the fact that this Court had decided that wiretapping and its disclosure constituted a Federal crime. This was held in *Benanti* v. *United States*, 355 U.S. 96. Amazingly, the Court below conceded and recognized that this Court had branded wiretapping as illegal and expressed the greatest sympathy for the plight of the petitioner herein. It further recognized that the United States Attorneys had apparently adopted a policy of neglect and have uniformly refused to prosecute

any state law enforcement officials who use wiretapping. (See *Pugach* v. *Dollinger*, 277 F. 2d 739). In *Dyke* v. *Taylor Implement Mfg. Co., Inc.* — U.S. — 3 Cr. L. 3083 (Decided May 20, 1968), *this Court held just very recently that a conviction for contempt based upon illegal evidence was improper and the petitioner could not legally be incarcerated by virtue of that conviction.*

While the illegal evidence in the case of *Dyke* v. *Taylor Implement Mfg Co., Inc.* is not identical with that herein, in both cases illegal evidence is the cause of the incarceration and, therefore, there is no sound reason why the same principles as enunciated in *Dyke* should not be applied.

Since the decision of this Court in *Schwartz* v. *Texas* and *Pugach* v. *Dollinger*, we have not only seen the pronouncement of *Mapp* v. *Ohio, supra*, but also such other cases as *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Pointer* v. *Texas*, 380 U.S. 400 (1965); and *Miranda* v. *Arizona*, 384 U.S. 436, 464 (1966). These cases also clearly express the view that the Federal Constitution in many respects is directly binding upon the States through the Fourteenth Amendment. Thus the same rights that protect the citizen against Federal encroachment also protect the citizen against State encroachment. The Supremacy Clause of the United States Constitution clearly indicates that where Congress has acted, no State may enact a law contrary thereto. (See Article 6, Clause 2, of the United States Constitution)

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the *Supreme Law of the Land;* and the Judges in every State shall

> be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The decisions in *Pugach* v. *Dollinger* and *Schwartz* v. *Texas* are consistent with the interpretation of the New York Court of Appeals in *People* v. *Defore,* 242 NY 13, where it was held that evidence no matter how obtained, lawfully or unlawfully, could be used so long as the evidence was material and relevant. This Court in *Wolf* v. *Colorado,* 338 U.S. 25, had refused to raise the exclusionary rules of the Fourth Amendment to Constitutional dignity. In *Mapp* v. *Ohio,* however, 367 U.S. 643, 655, 656, this Court once and for all raised the exclusionary rules to constitutional dignity and expressed the view that "deterrence" of official illegality was the objective to be sought and not merely punishment of the constable who may have blundered. It was clear to this Court, as it must still be today, that the constable almost never is punished for his transgressions. The only method of enforcing respect for the constitution and the rights of citizens is to insist that the police obey these constitutions and laws, otherwise the fruits of their efforts will be taken away from them.

A change in law may occur by a process of attrition, and this Court recognized in *Katz* v. *United States,* 389 U.S. 347 that evolution had overruled prior law:

> *"We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling.* The Government's activities in electronically listening to and recording the Petitioner's words violated the privacy upon which he justifiably relied while using the telephone . . . and thus constituted a 'search and seizure'

within the meaning of the Fourth Amendment." (Italics ours)

In that case, this Court was overruling its long-time holding in *Olmstead* v. *United States*, 277 U.S. 438.*

It is submitted that subsequent rulings of this Court in such cases as *Mapp* v. *Ohio, Berger* v. *New York, Katz* v. *United States,* and so forth, clearly indicate that the "underpinnings" of *Schwartz* v. *Texas* and *Pugach* v. *Dollinger* have likewise eroded and they should be declared as no longer representing controlling law.

It must be borne in mind that the Court below indicated that it would have acted to prevent an injustice against petitioner were it not for this Court's holdings in *Schwartz* v. *Texas* and *Pugach* v. *Dollinger*. It is frankly inconceivable that in view of subsequent cases the holdings of *Schwartz* and *Pugach* are still valid.

It is respectfully contended that this Court should once and for all resolve any doubts by declaring that the decisions in *Pugach* v. *Dollinger* and *Schwartz* v. *Texas* should no longer be regarded as valid.

To have eradicated the ridiculous holding in *People* v. *Defore, supra,* but maintain it in the field of wiretapping is a complete paradox and does not lend itself to an orderly administration of justice, and moreover, causes a great deal of injustice to hapless citizens of the United States who find that they are without remedy despite crimes which are being committed against them by state law enforcement officers in the unrestrained and promiscuous use of wire-

* In *People* v. *Kaiser, supra,* 21 N.Y. 2d 86, 286 N.Y.S. at 816, the N.Y. Court assumed *Olmstead* was still viable law.

tapping. The alleged court order which was obtained was under the New York Statute which this Court has held in *Berger* v. *New York* to be "unconstitutional" on its face. The New York Court of Appeals in *Kaiser* (*People* v. *Kaiser, supra*) in effect overruled this Court. Subsequently, this Court granted certiorari in the case of *Kaiser* v. *New York,* and it appears that the reason for doing so is that the New York Court of Appeals was not justified in assuming that *Berger* v. *New York* did not mean what it said.*

If Rosado is permitted to remain in jail solely because of the illegal use of wiretaps against him, then a great injustice will have been wrought and the Federal Courts will assume that they are powerless to interfere when States wish to use wiretap evidence in the investigation of crime.

It is argued that Rosado was not a "defendant" in a criminal case. That does not change the fact that he was and will be incarcerated because of the illegal wiretap evidence and the Court is quoting a distinction without a difference. Moreover, it lost sight of the fact that Rosado was a defendant in a criminal contempt indictment of which he was found guilty also exclusively because of the wiretapping evidence.

This Court, therefore, should resolve the doubt that lingers over the viability of *Schwartz* v. *Texas* and *Pugach* v. *Dollinger,* and once and for all hold that they are no longer controlling rulings.

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* This Court has enjoined statutes which are unconstitutional on their face as herein. *Dombrowski* v. *Phister,* 380 U.S. 479. The action was taken at behest of the petitioner who was "affected" by the statute, but not necessarily deprived of any rights. Herein, Rosado has suffered imprisonment and economic loss to say naught of social stigma.

POINT III

Petitioner is without a remedy unless this Court rules that *Schwartz v. Texas* and *Pugach v. Dollinger* are no longer binding decisions, and that they have been impliedly overruled by subsequent cases such as *Mapp v. Ohio, Berger v. New York* as well as *Katz v. United States.*

A

Since wiretapping is a violation of Federal Law, this Court ought to declare that it may not be used for any purpose at all barring constitutionally valid warrants, which do not exist herein since the same statute prevailing in *Berger* was used herein.

The statute forbids the mere divulgence of a wiretap's existence, no less the contents thereof. (47 U.S.C. 605)

It is further to be noted that unlike the first part of the section (605), the second part, herein involved, does *not* permit the divulgence of a wiretap even in response to a subpoena or on demand of any lawful authority. *The ban is absolute and has no exceptions,* but "consent".

Bubis v. *United States,* — F. 2d —, 2 Cr L 2123 (9th Cir. decided 10/20/67).

The Circuit Court seems to be preoccupied with the thought that since Rosado is not a defendant, but a witness (held in $25000 bail) in an alleged grand jury proceeding where several different grand juries are used at whim by the prosecutor, that he has no standing to object.

It has already been demonstrated that Rosado was and is an indicted defendant and was convicted after trial as a result of this very wiretapping.

Moreover, the fact that the State has incarcerated him and substantially ruined him economically and socially is more important than the niceties of nomenclature. If his rights have been traduced by wiretapping, the federal courts ought at least not permit his incarceration. The fact that federal prosecutors have chosen to permit violations of federal law is no reason for this Court to condone such lawlessness. A *cabal* between federal and state prosecutors to refuse to enforce respective laws against each others' lawless conduct would create an oppressive "police" state.

That Rosado has been seriously harmed and prejudiced is obvious from the fact that he has been imprisoned and is now on bail. He will have to return to prison if this Court doesn't help him. He would face possible future imprisonment as well.

To recognize that the District Attorney is violating the federal law and that the evidence is illegal, and yet grant no remedy is cruel and incredible. Yet the Circuit Court places the *blame* on this Court for this anomalous result citing *Schwartz* and *Pugach*. (Since the author of this brief argued *Pugach* for the State, he knows quite well that it relied strongly on the theory of the *Defore* rule and on the *pre-Mapp* attitude of this Court.)

This Court has consistently recognized that the States must harmonize their view of due process with that of the federal government. (*Ker* v. *California*, 374 U.S. 23). It has consistently expanded the rule that the Bill of Rights is binding on the States (see: *Mapp* v. *Ohio, supra; Berger* v. *New York, supra; Duncan* v. *Louisiana*, — U.S. — 3 Cr L 3062 (decided May 20, 1968); *Bruton* v. *United States*, — U.S. — 3 Cr L 3085, (May 20, 1968); and *In re Gault*, 387 U.S. 1). (See also, *Hunt* v. *Connecticut*, — U.S. —, 6/10/68.)

B

The fact that the Grand Jury supposedly conferred immunity upon Rosado is irrelevant and deceptive. The District Attorney is really seeking immunity for his own crimes by the insidious ruse of compelling Rosado to articulate the substance of the wiretapping. Thereby the District Attorney assumes that he will be exonerated from the crime the Circuit Court and this Court clearly have held was committed when divulgence of the wiretap occurred.

The district attorney and the concurring opinion of the Court below seem to believe that the divulgence of the wiretapping is not within the purview of the federal courts because of the alleged grant of immunity to Rosado. The district attorney, however, and *not* Rosado committed the violation of Section 605 when he divulged the existence of a wiretap. The immunity conferred upon Rosado was in an endeavor to compel him to testify under threat of incarceration.

It is submitted, however, that the district attorney was thereby seeking absolution for the crime *he* (the prosecutor) committed and the immunity given to Rosado was irrelevant.

If placing a gun to Rosado's head, he had compelled Rosado to divulge atomic secrets, the fact that he later procured the grand jury to grant Rosado immunity would not exonerate the district attorney for his conduct.

Indeed, if under a threat of imprisonment for contempt, Rosado is compelled to aid and abet the district attorney in the commission of a federal crime (47 U.S.C. 605, 501), it is clear that even without a grant of immunity Rosado would not be liable. But that would not be true of the district attorney.

The Petitioner did not "consent" to the divulgence of the wiretap since the consent was by virtue of the threat of incarceration. Consent must be voluntary. (*Judd* v. *United States*, 190 F. 2d 649, 651 (D.C. Cir. 1951); *Johnson* v. *United States*, 333 U.S. 10). The immunity granted to Rosado was not sufficient to immunize him or the district attorney against a federal crime committed *in futuro*, since immunity does not operate prospectively, but retrospectively, as to past transgressions (47 U.S.C. § 409(L); *Counselman* v. *Hitchcock*, 142 U.S. 547, 585, 586; *Malloy* v. *Hogan*, 378 U.S. 1).

In the concurring opinion of Lumbard, Ch. J., in the Court below (slip op. p. 1966) he declared:

> "It is clear to me that a reluctant witness before a grand jury *who testifies under the threat of punishment for contempt* as to the contents of a telephone conversations to which he was a party is *not a willing participant* in an alleged scheme to violate § 605 so as to be an aider and abettor of the scheme." (Italics supplied).

Chief Judge Lumbard, however, misunderstood the rationale of why Rosado could not be prosecuted. He was not voluntarily divulging the information, but in addition, as a party to the conversation he might qualify as a "sender" thereby immunizing him from prosecution under any circumstances.

The vice of the problem is that the District Attorney is the culprit committing the crime. What the Circuit Court overlooked is that the compulsion used against Rosado was a "gimmick" to exculpate the prosecutor from involvement in a federal crime.

This Court, however, cannot be so naive and will undoubtedly see through this ruse. The State authorities ought not be permitted to use illegal evidence, perhaps obtained feloniously in violation of New York law (N.Y. Penal Law §§ 738, 740; Revised Penal Law, §§ 250.00, 250.05), to cause the incarceration of a citizen for any reason.

This was held in essence in *Mapp* v. *Ohio* which this Court thought had closed the last door to official lawlessness. It must be remembered that the *Grand Jury* under New York law is an *arm of the Court* and what is used or adduced there is in effect used or aduced in Court.

Thus in *Mapp* v. *Ohio*, 367 U.S. 643, this Court held:

> "Today we once again examine Wolf's constitutional documentation of the *right to privacy* free from unreasonable state intrusion, and, after a dozen years on our books, are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of the basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."*

It is now clear that *this court did not close the last remaining door left open* since according to the Court below, *Schwartz* v. *Texas* and *Pugach* v. *Dollinger* still permit lawless invasions of privacy without remedy in the field of wiretapping.

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* The grand jury is an arm of the state court and may receive none but "legal" evidence. (§ 249 Code Crim. Pro.; "arm of court" re Mullen, 177 Misc. 734).

It is true that the decision of this Court in *Berger* v. *New York,* would seem to have put to rest the viability of wiretapping in New York since it branded the statute as "void on its face". Yet, despite the realization that the very act of wiretapping is a felony without a lawful order (Penal Law 738, 740; Revised Penal Law 250.00 and .05), the district attorney of Nassau County has persisted in the flagrant use of wiretaps. He is unconcerned with the federal law as the United States attorneys have desisted from bothering him.

The least that this Court can do is to deter this lawlessness by ordering the victims of this lawlessness to be *released from custody* and hold that such evidence is inadmissible in a State Court.

In a three justice dissent, Justice Fortas in *Granello* v. *United States,* 386 U.S. 1019 (1967) states *inter alia* that eavesdropping (and wiretapping) is "trespassory espionage". Then referring to wiretapping, "But this is *'dirty business'. Olmstead* v. *United States,* 277 U.S. 483, 470).

In 39 N. Y. U. L. Rev. 962, 973, 974, the author stressed the fundamental need for "privacy" and freedom from governmental intrusion.

> "(O)ur Western Culture defines individuality as including the right to be free from certain types of intrusions. This measure of personal isolation and personal control over the conditions of its abandonment is the very essence of personal freedom and dignity, is part of what our culture means by those concepts. A man whose conversations may be overheard at the will of another, whose home may be entered at the will of another, whose marital and familial intimacies

may be overseen at the will of another, is *less of a man,* has *less human dignity,* on that account. He who may intrude upon another at will is the master of the other and in fact, *intrusion is the primary weapon of the tyrant.*" (Emphasis supplied).

See:

Mapp v. *Ohio, supra; Berger* v. *New York, supra* and *Katz* v. *United States, supra.*

CONCLUSION

This Court should once and for all close the final door remaining open which permits lawlessly obtained evidence to be used in judicial proceedings, and to that end, *Schwartz v. Texas* and *Pugach v. Dollinger* should once and for all be discredited as they most certainly have been by a process of attrition.

The order of the Circuit Court denying the issuance of a writ of habeas corpus should be reversed and the writ should be ordered to issue.

Respectfully submitted,

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Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 367—September Term, 1967.

(Argued February 7, 1968 Decided April 24, 1968.)

Docket No. 32056

UNITED STATES OF AMERICA, *ex rel.* COSME ROSADO,

Petitioner-Appellant,

—against—

WALTER J. FLOOD, Warden of the Nassau County Jail,

Respondent-Appellee.

Before:

LUMBARD, *Chief Judge,*
WATERMAN and FEINBERG, *Circuit Judges.*

Appeal from an order of the United States District Court for the Eastern District of New York, Jacob Mishler, *J.*, denying a writ of habeas corpus to petitioner, who was held in contempt for failing to answer certain questions before a grand jury. Affirmed.

IRVING ANOLIK, New York, N. Y., *for Petitioner-Appellant.*

GEORGE DANZIG LEVINE, Assistant District Attorney (William Cahn, District Attorney, County of Nassau, State of New York, on the brief), *for Respondent-Appellee.*

FEINBERG, *Circuit Judge*:

Relator Cosme Rosado appeals from an order of the United States District Court for the Eastern District of New York, Jacob Mishler, *J.*, which denied his application for a writ of habeas corpus. On December 1, 1967, appellant was held in contempt by the County Court of Nassau County for refusing to answer questions before a grand jury. Appellant was sentenced to thirty days in jail under Judiciary Law §750 et seq., but was advised that he could purge himself by testifying. As a result of various procedural moves, that sentence has not been fully served, and appellant is now admitted to bail pending determination of this appeal.[1] For reasons given below, we affirm Judge Mishler's order denying the writ.

The facts leading to Rosado's refusal to answer are not in substantial dispute and can be briefly summarized. For some time, a Nassau County grand jury has been investigating organized crime, particularly gambling activities. Through the use of wiretaps obtained under court order pursuant to section 813-a of the Code of Criminal Procedure of New York, Rosado became known to the investigators. Rosado is the president of a labor union and has no prior criminal record. He was summoned to testify, under a grant of immunity, before the grand jury. The questions Rosado refused to answer apparently concerned

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[1] Rosado's incarceration apparently began on December 20, 1967. Appellant moved for a stay of execution of the sentence before the Appellate Division and the New York Court of Appeals, and relief was denied by both courts. He then sought a writ of habeas corpus from Judge Mishler, who denied the writ, as well as a certificate of probable cause and bail pending appeal. On January 16, 1968, this court granted a certificate of probable cause, set bail at $500, and ordered an expedited appeal.

the contents of intercepted telephone conversations to which he had been a party. Rosado claims that the District Attorney of Nassau County has disclosed recordings of these and other conversations to him and to others, including the press. Appellant argues that compelling him to reveal the substance of the conversations would be improper under the Federal Communications Act, 47 U. S. C. §605,[2] and the federal constitution.

Rosado's brief eloquently argues that the state practice of allowing judicially authorized wiretaps is in conflict with section 605. The point hardly needs elaboration; most recently, it was the subject of opinions of the Supreme Court

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[2] That section provides:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmissions or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto. . . .

in *Benanti* v. *United States,* 355 U.S. 96 (1957), and of this court in *Pugach* v. *Dollinger,* 275 F. 2d 503 (2d Cir. 1960) (granting stay); *Pugach* v. *Dollinger,* 277 F. 2d 739 (2d Cir. 1960) (*en banc*), aff'd, 365 U. S. 458 (1961). However, even if we agree with appellant that the District Attorney has violated section 605, there is a substantial question whether because of that we could properly grant the writ under presently controlling law. Under *Schwartz* v. *Texas,* 344 U. S. 199 (1952), evidence obtained in violation of section 605 may nonetheless be introduced in a criminal trial in a state court. The rationale of that decision was

> that despite the plain prohibition of Section 605, due regard to federal-state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect.

Benanti v. *United States,* 355 U. S. 96, 101 (1957). And under *Pugach* v. *Dollinger, supra,* we may not enjoin the District Attorney from using wiretap evidence at trial. Moreover, federal prosecutors have shown no apparent interest in violations of section 605 by state officers, despite some strong suggestions by the courts. *E.g., Pugach* v. *Dollinger,* 277 F. 2d at 746 (Waterman, *J.*, concurring). Cf. *People* v. *Kaiser,* 286 N. Y. S. 2d 801, 814 (N. Y. 1967), cert. granted, 36 U. S. L. W. 3404 (U. S. April 22, 1968). So long as that state of the law remains unchanged, however much some of us might disagree with it, a strong case can be made that we must affirm here; the argument would be that if we should not interfere with the use of wiretap evidence at a state trial, *a fortiori* we should not interfere with the collection of the evidence here by the Nassau County grand jury.

It is true that the law on electronic eavesdropping generally is in flux. In *Katz* v. *United States,* 389 U. S. 347 (1967), the Supreme Court recently held that "electronically listening [to] and recording" one end of a telephone conversation can be an unconstitutional "search and seizure" under the fourth amendment, even though there was no physical intrusion into a protected area. See also grant of certiorari in *Lee* v. *Florida,* 36 U. S. L. W. 3101, 3286 (U. S. Jan. 15, 1968). If we had to deal with the effect of *Katz* on this case, we would be faced with such issues as to what extent, if any, that decision is retroactive, cf. *Linkletter* v. *Walker,* 381 U. S. 618 (1965); compare *Berger* v. *New York,* 388 U. S. 41 (1967), with *People* v. *Kaiser, supra;* see also *Desist* v. *United States,* 36 U. S. L. W. 3337, 3345 (U. S. Mar. 4, 1968) (granting certiorari), and whether the wiretapping here accorded with the procedural safeguards required by *Katz.* A further complication would be that Judge Mishler held that Rosado orally waived any fourth amendment claim, and an examination of the record indicates that the oral argument in the district court did center around the effect of section 605 rather than the constitutional question.

However, we do not find it necessary to resolve these difficult issues. Rosado is not, nor apparently is he likely to be, an indicted defendant; he is merely a witness before a grand jury. It has traditionally been held that such a witness usually cannot impede collection of evidence by the grand jury even though the issues he seeks to raise could later be litigated—perhaps with success—by an indicted defendant; e.g., *Blair* v. *United States,* 250 U. S. 273 (1919) (constitutionality of statute whose violation

grand jury is investigating); *United Staes* v. *Neff*, 212 F. 2d 297 (3d Cir. 1954) (improper venue). See *United States* v. *Masterson*, 383 F. 2d 610 (2d Cir. 1967). The rationale of this doctrine is that the scope of a grand jury inquiry "is not to be limited narrowly," *Blair* v. *United States*, 250 U. S. at 282, because it is "an important investigative instrument." *United States* v. *Cleary*, 265 F. 2d 459, 461 (2d Cir.), cert. denied, 360 U. S. 936 (1959); see *United States* v. *Winter*, 348 F. 2d 204 (2d Cir.), cert. denied, 382 U. S. 955 (1965). Rosado relies on *United States* v. *Tane*, 329 F. 2d 848 (2d Cir. 1964), in which this court affirmed the dismissal of an indictment because it was based on an unlawful wiretap. In that case, the indictment rested almost exclusively on the testimony of a witness before the grand jury whose identity and willingness to testify were both the product of the wiretap. But in *Tane*, it was the defendant, not the grand jury witness, who successfully moved to dismiss. Whatever remedy might be available either to suppress evidence obtained through wiretaps, cf. *In re Fried*, 161 F. 2d 453 (2d Cir.), cert. denied, 331 U. S. 858, cert. granted, 331 U. S. 804, cert. dismissed, 332 U. S. 807 (1947); *United States* v. *Klapholz*, 230 F. 2d 494 (2d Cir.), cert. denied, 351 U. S. 924 (1956); *Grant* v. *United States*, 282 F. 2d 165 (2d Cir. 1960), or to challenge an indictment based on such evidence, we do not feel justified on these facts in preventing the grand jury from requiring witness Rosado to answer questions before it.[3] *United States* v. *McClosky*, 273 F Supp. 604 (S. D. N. Y. 1967).

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[3] In view of the grant of immunity and our conclusion that Rosado himself will not be violating §605, see discussion *infra*, there is no remaining problem of self-incrimination raised by appellant.

Respondent offers a number of additional reasons why habeas corpus relief is unavailable to petitioner; e.g., Rosado has not exhausted state remedies;[4] since Rosado can purge himself by testifying, his detention is voluntary. However, we need not consider these arguments in view of our disposition of the case. Rosado claims that he will be compelled to violate section 605 himself if he testifies and that no state grant of immunity can protect him; his theory is that he will thereby be aiding and abetting the prosecutor's violation. The point was not pressed at oral argument, but we have considered it. On the sketchy record before us, we cannot be sure what questions Rosado has refused to answer, but we assume, as Judge Mishler did, that they deal with conversations to which he was a party. By disclosing, under the compulsions present here, the contents of those, Rosado will not be criminally liable.

Judgment affirmed.

LUMBARD, *Chief Judge* (concurring):

I concur in affirming the denial of the writ of habeas corpus because I find no merit to Rosado's argument that he is in State custody in violation of federal law.

The transcript of the hearing in the district court shows that Rosado is in state custody for refusing to answer questions before a Nassau County grand jury concerning the contents of telephone conversations to which he was

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4 Judge Mishler held that petitioner had exhausted state remedies despite respondent's claim that an Article 78 proceeding was still available. Cf. note 1 *supra*.

a party. Since the District Attorney concededly obtained knowledge of these conversations and their contents pursuant to §813-a of the New York Code of Criminal Procedure, and but for these wiretaps would not have asked the questions which Rosado has refused to answer, Rosado argues that he would be committing the federal crime of aiding and abetting the disclosure of wiretap information if he were to answer the questions which were put to him.

However, Rosado in answering the questions could not be guilty of aiding and abetting the commission of a federal crime. In order to aid and abet another to commit a crime, it is necessary that one "in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed." *United States* v. *Peoni*, 100 F. 2d 401, 402 (2 Cir. 1938). *Nye & Nissen* v. *United States*, 336 U. S. 613, 619 (1949); *United States* v. *Manna*, 353 F. 2d 191, 192 (2 Cir. 1965). It is clear to me that a reluctant witness before a grand jury who testifies under the threat of punishment for contempt as to the contents of telephone conversations to which he was a party is not a willing participant in an alleged scheme to violate §605 so as to be an aider and abettor of the scheme. Furthermore, the majority opinion ably explains why we would not interfere with a grand jury's power to compel a witness to testify in a situation such as this.

Since Rosado does not claim that he is in custody in violation of his constitutional rights and we do not find that he is in custody in violation of the laws of the United States, I concur in affirming the district court's decision denying the petition.

Constitutional and Statutory Provisions (Excerpts)

ARTICLE VI, CL. 2: U.S. CONST.

"This Constitution and the Laws of the United States . . . shall be supreme Law of the Land; and the Judges in every State shall be bound thereby . . ."

AMENDMENT IV

"The right of the people to be secure in their persons, houses, and papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

AMENDMENT XIV, SECTION 1:

". . . nor shall any State deprive any person of life, liberty or property without due process of law . . ."

ARTICLE I, SECTION 12, NEW YORK CONST.

"The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

47 U.S.C. § 605 (F.C.C. ACT)

". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication to any person . . ."

§ 740, N.Y. PENAL LAW

A person who violates any subdivision of section seven hundred thirty eight of this chapter shall be guilty of a felony punishable by imprisonment for not more than two years. [Sec. 738 prohibits unauthorized eavesdropping]

§ 813-a. EX PARTE ORDER FOR INTERCEPTION, OVERHEARING OR RECORDING.

An ex parte order for the interception, overhearing or recording of telegraphic or telephonic communications may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone number or telegraph line, and particularly describing the person or persons whose communications are to be intercepted, overheard or recorded and the purpose thereof. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application

was based, shall be delivered to and retained by the applicant as authority for intercepting, overhearing or recording, or directing the interception, overhearing or recording of the telegraphic or telephonic communications transmitted over the instrument or instruments described. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same. Added L. 1942, c. 924; amended L. 1957, c. 879, § 1, eff. July 1, 1957.

Order

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES ex rel. COSME ROSADO,

Relator-Appellant,

—against—

WALTER J. FLOOD, WARDEN OF THE NASSAU COUNTY JAIL,

Respondent-Appellee.

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate and to continue bail pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that such petition for rehearing be and it hereby is denied; and it is

Further ordered that the motion to stay the mandate and to continue bail is granted on the terms and conditions provided in Rule 28(c) of the Rules of this court.

May 17, 1968

/s/ J. IRVING LUMBARD
/s/ STEVEN R. WATERMAN
/s/ WILFRED FEINBERG
U.S. Circuit Judges